IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 13TH NOVEMBER 2007 / 22ND KARTHIKA 1929

ST.Rev..No. 24 of 2004

ORDER DATED 27.9.2002 IN TA.63/1999 OF THE KERALA SALES TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH-I, ERNAKULAM

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REVISION PETITIONER/APPELLANT:

M/S. WIPRO LIMITED
(FORMERLY WIPRO INFOTECH LIMITED),
A & P ARCADE,
SAHODARAN AYYAPPAN ROAD,
KOCHI-682 016,
REPRESENTED BY ITS MANAGER - FINANCE,
MR.M.SIVAKUMAR.

BY ADV. SRI.JOSEPH MARKOSE
SRI.MITHUN MARKOS
& SRI.JOSEPH KODIANTHRA

RESPONDENT/RESPONDENT:

STATE OF KERALA,
REPRESENTED BY THE SECRETARY (TAXES),
TRIVANDRUM.

BY SR.GOVERNMENT PLEADER MR.MUHAMMED RAFIQ

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 13/11/2007, ALONG WITH ST REV. NO. 251 OF 2004 & CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & K.M.JOSEPH, J.

S.T.Rev.Nos. 24 of 2004, 251 of 2004, 252 of 2004, 267 of 2004 & 278 of 2004

Dated, this the 13th day of November, 2007

ORDER

H.L.Dattu, C.J.

M/s.Wipro Limited is a Public Limited Company. It is incorporated under the provisions of the Companies Act. It is engaged in the business of manufacturing and selling of computers, accessories, peripherals, printers, software etc.

(2). The petitioner Company is a registered dealer, registered both under the Kerala General Sales Tax Act and Central Sales Tax Act (KGST Act and CST Act for short).

(3). The petitioner Company in these tax revision cases, calls in question the legality or otherwise of the orders passed by the Sales Tax Appellate Tribunal in T.A.Nos.63/1999, 126/2002, 13/2000, 14/2000 and 142/2001. In the impugned order, for the assessment years 1992-1993 to 1996-1997, the Tribunal has concluded that the annual maintenance contract entered into by the petitioner Company with its customers is a 'works contract' and exigible to tax under the provisions of the KGST Act. It is also of the view that, the annual maintenance contract would fall under Entry 22 of the Fourth Schedule to the KGST Act. The assessee, aggrieved by those orders and findings, is before us, in these tax revision cases.

(4). The assessee has framed only two questions of law for our

consideration and decision. They are as under:

> *(i). Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the Annual Maintenance Contracts in question are works contracts falling within the scope of sale of goods assessable under the KGST Act.*
>
> *(ii). Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the Annual Maintenance Contracts in question will fall within Entry 22 of Schedule IV of the KGST Act?*

(5). In so far as the first issue is concerned, Sri.Joseph Kodianthara, learned counsel appearing for the assessee would tell us that, he would not press for an answer on the first issue. Taking into consideration the submission made by the learned counsel, we refrain from answering the first question of law framed by the assessee.

(6). The other question that requires to be considered and decided by us is, whether the annual maintenance contract that was entered into by the supplier namely the petitioner Company with its customers would fall under Entry 22 of the Fourth Schedule to the KGST Act.

(7). The assessing authority, for the assessment years in question, was of the view that, the annual maintenance contract is exigible to tax under Entry 9 of the Fourth Schedule to the KGST Act. According to

the assessing authority, the annual maintenance contract is nothing, but supply and fitting of electronic equipment. The view of the assessing authority is confirmed by the first appellate authority in the appeal filed by the assessee.

(8). In the second appeal filed, the Tribunal has not accepted the findings and conclusions reached by either the assessing authority or the first appellate authority, and, according to the Tribunal, the annual maintenance contract between the petitioner Company/assessee and its customer is a 'works contract', which would fall under the Residuary Entry, namely, Entry 22 of the Fourth Schedule to the KGST Act. The Tribunal in its order dated 27-9-2002 on this issue, has stated as under:

> *"7. The 2nd contention of the assessee assailing the concurrent finding of the lower authorities in this regard is that, even if AMC is treated as works contract as defined under the KGST Act it will not fall under entry 9 or 22 of schedule IV of the KGST Act as it stood at the relevant period and therefore AMC receipt is not exigible to tax. The assessee would point out that entry 9 is "supply and fitting of electronic equipment" and entry 22 is "other contracts involving construction, installation or fixing of goods not falling under Sl.Nos.1 to 21 above and therefore both these entries do not take in AMC. It is also pointed out that entry 22 is amended from 1.4.2000 to make it a residuary entry as "All other contracts not falling under sl.nos.1 to 21". According to the learned counsel for assessee, till amendment of entry 22 as aforesaid, it*

cannot be treated as a residuary entry as held by the authorities below. Relying on a decision of the Karnataka High Court in Book Centre Press Vs. Additional Commissioner 115 STC 76 the learned counsel argued that unless and until a particular work contract is brought under the 4th schedule, that contract is not exigible to tax. But we are unable to accept this contention of the assessee as well as discussed below.

8. We of course agree that the disputed contracts will not come under entry 9 of IVth schedule. But as already stated entry 22 of IVth schedule during the relevant period was "other contracts involving construction, installation or fixing of goods not falling under serial numbers 1 to 21 above". As pointed out by the learned Law Officer it is not possible to specify or envisage all types of works contract in an ever expanding field. Therefore it is quite possible that after specifying 21 such works contract, one entry is introduced to include all other contracts, as in the case of residuary entry in the 1st schedule. Any other interpretation is too narrow to stand to reasoning. The learned counsel for the assessee of course argued that the amendment to entry 22 was brought about from 1.4.2000 to fill up the lacuna and therefore it cannot be said that before that amendment, entry 22 is a residuary entry. But on a careful reading of the relevant entries we are of the view that even before the amendment, entry 22 of IVth Schedule is a residuary entry and the amendment was brought about in the year 2000 with a view to avoid any confusion. We therefore conclude that entry 22 of IVth schedule during the relevant period takes in AMC undertaken by the

assessee. In that view of the matter we hold that the assessee is not entitled to find support from the Karnataka decision in 115 STC 76 cited supra".

(9). Sri. Joseph Kodianthara, learned counsel appearing for the assessee would submit that, the reasoning and conclusion reached by the Tribunal that the annual maintenance contract between the assessee and its customer would fall under Entry 22 of Fourth Schedule to the KGST Act is erroneous since the language employed in the entry does not speak of Annual Maintenance Contract. In support of that contention, the learned counsel has taken us through the Entries in the Fourth Schedule to the KGST Act prior to its substitution by Act 8 of 2000 which has come into effect from 1-1-2000.

(10). Sri.Muhammed Rafiq, learned counsel appearing for the Revenue sought to justify the impugned order passed by the Tribunal.

(11). The petitioner, along with the orders passed by the authorities under the Act and also the Tribunal, has produced before us, the annual maintenance contract that has been entered into by the assessee with its customer. We do not intend, at this stage, to go into the terms and conditions of the agreement entered into between the assessee Company and its customer, since these are pure questions of fact which requires to be firstly decided by a fact finding authority like the Tribunal.

(12). The Tribunal, in its impugned order is of the opinion that, the annual maintenance contract is a contract, and if it does not fall

under any one of the Entries in the Fourth Schedule to the KGST Act, necessarily it would fall under the Residuary Entry. Apart from that, the Tribunal has not assigned any reasons whatsoever. In our opinion, the reasoning and conclusion reached by the Tribunal is difficult to accept.

(13). Prior to the substitution of the Fourth Schedule to the KGST Act, by Act 8 of 2000, Entry 22 of the Fourth Schedule read as under:

Entry 22: *Other contracts involving construction, installation or fixing of goods not falling under serial numbers 1 and 21 above.*

After its substitution by Act 8 of 2000, which is given effect from 1-1-2000, Entry 22 of the Fourth Schedule to the KGST Act reads as under:

> *All other contracts not falling under serial numbers 1 to 21 above.*

(14). We are not concerned herewith the rate of tax. According to the petitioner, the annual maintenance contract between the assessee and its customer is not a contract involving either construction or installation or fixing of goods. Whether the annual maintenance contract would involve either the construction or installation or fixing of goods can be determined only with reference to the terms and conditions of the annual maintenance contract that has been entered into between the assessee and its customer. In the instant case, the Tribunal, has mechanically proceeded to conclude that the annual maintenance contract is in the nature of a 'works contract' and since it does not fall under Entries

1 to 21 of Fourth Schedule to the Act and therefore should necessarily fall under residuary Entry 22, without really determining whether the annual maintenance contract entered into between the assessee Company with its customer would involve either the construction or installation or fixing of goods.

(15). If the annual maintenance contract does not involve any one of the afore-said ingredients, then necessarily, even if it is a works contract, then it cannot be taxed under any one of the Entries to the Fourth Schedule to the Act. May be realising that position, the Legislature has thought it fit to amend Entry 22 of the Fourth Schedule to the Act substituting the earlier Entry with the Entry *"all other contracts not falling under serial numbers 1 to 21 above"*. At this stage, we do not intend to express our opinion in this regard.

(16). The Tribunal has not looked into the terms and conditions of the annual maintenance contract that was entered into between the supplier and the customer and secondly, simply following the observations made by the Karnataka High Court in the case of ***Wipro Infotech Ltd. Vs. Deputy Commissioner of Commercial Taxes { (2000) 120 STC 159}*** where the Entry 21 of the Sixth Schedule to the Act relating to full service and maintenance of instruments, equipment, appliances or plant and machinery, has proceeded to hold that the annual maintenance contract that is entered into by the assessee Company with its customer is a contract which would fall under the Residuary Entry. This

conclusion, in our opinion, cannot be sustained, in the light of the language employed in Entry 22 of the Fourth Schedule to the KGST Act. To arrive at a proper conclusion, it is expected of the Tribunal to look into the terms and conditions of the annual maintenance contract and then only come to the conclusion whether it would fall under Entry 22 of the Fourth Schedule to the KGST Act.

(17). In that view of the matter, in our opinion, the orders passed by the Tribunal on the question that the annual maintenance contract would fall under Entry 22 of the Fourth Schedule to the KGST Act requires to be set aside and the matter requires to be remanded to the Tribunal for fresh disposal, in accordance with law. In so far as the other findings are concerned, since the same is not pressed by the learned counsel Sri.Joseph Kodianthara, the other findings and reasonings are not disturbed by us. Accordingly, we pass the following:

ORDER

(i). The Revision Cases are allowed in part.

(ii). The findings and conclusions reached by the Tribunal on the question whether the annual maintenance contract would fall under Entry 22 of the Fourth Schedule to the KGST Act is set aside.

(iii). The matter is now remanded to the Tribunal to decide the issue, whether the annual maintenance contract in question would fall under Entry 22 of Fourth Schedule to the KGST Act, before its substitution by Act 8 of 2000, which has come into effect from 1-1-2000,

keeping in view the terms and conditions of the annual maintenance contract between the parties. It is needless to say, that the Tribunal, before passing any orders would give an opportunity of hearing to both the parties.

Ordered accordingly.

(**H.L.DATTU)**
CHIEF JUSTICE

(K.M.JOSEPH)
JUDGE

MS/DK.